

1948

## Judicial and Regulatory Decisions

---

### Recommended Citation

*Judicial and Regulatory Decisions*, 15 J. AIR L. & COM. 231 (1948)  
<https://scholar.smu.edu/jalc/vol15/iss2/8>

This Current Legislation and Decisions is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

# JUDICIAL AND REGULATORY DECISIONS

Department Editor: Amory O. Moore\*

## ECONOMIC REGULATION OF IRREGULAR AIR CARRIERS

UNDER the authority of Section 416 of the Civil Aeronautics Act,<sup>1</sup> the CAB in May, 1947, increased its economic control over those air carriers operating without a certificate of public convenience and necessity by revising Section 292.1 and adopting Section 292.5 of its economic regulations.<sup>2</sup> Now designated as "Irregular Air Carriers" and "Non-certificated Cargo Carriers,"<sup>3</sup> these operators have been made subject to most of the provisions of Title IV of the Civil Aeronautics Act<sup>4</sup> though they continue to be exempted from the requirement of the certificate of public convenience and necessity. "Private" or "contract" carriers have not been affected by the revision.<sup>5</sup>

For the purpose of economic regulation, the Board has divided Irregular Air Carriers into two classes based on the weight of aircraft utilized in air transportation.<sup>6</sup> The smaller carriers are extended greater exemptions than are those carriers using aircraft of large size.<sup>7</sup> These relate chiefly to filing of tariffs and reports relative to financial aid and control. Larger carriers must, however, file quarterly operational reports not now required of the smaller operators.<sup>8</sup> All Irregular Air Carriers must secure a letter of registration from the Board to engage in any form of air transportation. The revision prohibits foreign air transportation of persons and prohibits

---

\* Journal Editor, Northwestern University Legal Publications Board.

<sup>1</sup> 52 Stat. 1004 (1938), 49 USCA §496 (Supp. 1946).

<sup>2</sup> 12 Fed. Reg. 3076, 3079 (May 10, 1947).

<sup>3</sup> Irregular Air Carriers are generally those who were engaged in non-scheduled operations prior to the revision. Non-certificated Cargo Carriers are those carriers who were actively engaged in the business of carrying property by air on May 5, 1947, and who, on that date, had pending with the Board applications for certificates of public convenience and necessity authorizing scheduled interstate and overseas transportation. Why this date was chosen does not appear. The status of such carriers as the Santa Fe Railroad and its wholly owned subsidiary, Santa Fe Skyways, Inc., who filed applications for certificates between May 5, 1947 and the date of publication of the regulation (the regulation was available on May 8 and was published in the Fed. Reg. on May 10) might be open to some doubt, as the classifications permitted under §416 of the Act must be "just and reasonable."

<sup>4</sup> 52 Stat. 987, (1938), 49 USCA §§481-496 (Supp. 1946).

<sup>5</sup> The term "contract carrier" was unknown to the common law which recognized only common carriers and private carriers. The latter class was divided into private carriers "for hire" and "not for hire." The former sub-classification clearly covers "contract carriers" as defined in the Motor Carrier Act of 1935 and the Water Carrier Act included in the Transportation Act of 1940. The term "contract carrier" probably has no significant meaning or status under the Civil Aeronautics Act except insofar as decisions in motor or water carrier cases may, by analogy, apply in determining whether a particular air carrier is or is not a common carrier.

<sup>6</sup> Those carriers which do not utilize any single aircraft having a gross take-off weight in excess of 10,000 pounds, or three or more aircraft (excluding those units under 6,000 pounds) having an aggregate allowable gross take-off weight over 25,000 pounds constitute the class extended additional exemptions.

<sup>7</sup> The Board estimates 90% of the total passenger miles were flown by operators using larger aircraft, though they constituted only 20% of the numerical total of irregular air operators.

<sup>8</sup> CAB Economic Regulations §292.1(c) (6), 12 Fed.Reg. 3076 (May 10, 1947).

all service between any points with a "reasonable degree of regularity."<sup>9</sup> Non-certificated Cargo Carriers are controlled by another section of the economic regulations<sup>10</sup> which permits them to operate as cargo common carriers until their applications for cargo certificates of public convenience and necessity are determined by the Board. Alaskan Air Carriers and irregular operators within Alaska continue to be regulated by a separate section of the regulations and are not affected by the revision.<sup>11</sup>

The problem of non-scheduled air transportation is of comparatively recent origin. Under the Civil Aeronautics Act of 1938, the Board was given power to exempt air carriers from most of the provisions of Title IV under certain circumstances.<sup>12</sup> Acting under that authority, the Board established the classifications of "scheduled" and "non-scheduled" operations and exempted non-scheduled operations from most of the economic provisions of the Act.<sup>13</sup> Before the recent war, non-scheduled operations were of limited economic significance as most non-scheduled operators were engaged in air transportation only to a limited degree, and then chiefly as a joint product of such other services as crop dusting, aerial advertising, aerial photography, flight instruction, operation of airports, and the sale and servicing of aircraft. The Board at that time devoted its energies to the development of a certificated air network in the United States and abroad and felt it unnecessary to regulate the smaller operations.<sup>14</sup>

The wartime stimulus to aviation, the availability of surplus aircraft, and the general acceptance of air transport foreshadowed a tremendous growth in non-certificated operations and caused the Board in July, 1944, to authorize an investigation into matters relating to and concerning non-scheduled air transportation.<sup>15</sup> The purpose was to determine what should be the extent of permanent economic regulation and the desirability of revising or terminating the general exemption order under which services could be rendered without Board authorization. The report of the examiners recommended the repeal of the existing exemption order and the adoption of an order based on a proposed new classification of air carriers.<sup>16</sup>

<sup>9</sup> *Id.* (b); a point is defined as an airport and all territory within a twenty-five mile radius. *Id.* (b) (6).

<sup>10</sup> CAB Economic Regulations §292.5, 12 Fed.Reg. 3079 (May 10, 1947). The exemptions accorded are temporary and will expire for any one carrier in this class sixty days after final Board action on its application for a certificate.

<sup>11</sup> CAB Economic Regulations §292.2, 7 Fed.Reg. 11108 (1942), 9 Fed.Reg. 8005 (1944), 10 Fed.Reg. 9314 (1945), 11 Fed.Reg. 7888 (1946). *Alaska Air Transport Investigation*, 2 CAB 785 (1941); *Ackerman Air Service, et al., Alaska Air Transportation Investigation*, 3 CAB 804 (1942). The Board is considering at the present time a proposed exemption of cargo carriers between Alaska and the United States. 12 Fed.Reg. 7947 (Nov. 26, 1947).

<sup>12</sup> §416 of the CIVIL AERONAUTICS ACT. 52 Stat. 977 at 1004 (1938), 49 USCA §401 *et seq.* at §496 (Supp. 1946). "The Authority from time to time and to the extent necessary may . . . exempt from the requirements of this title or any provision thereof, or of any rule, regulation, term, condition, or limitation thereunder, any air carrier or class of air carriers, if it finds the enforcement of this title or such provision, rule, regulation, term, condition, or limitation, is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest."

<sup>13</sup> For an excellent discussion of the status of non-scheduled operations prior to the current revision of §292.1, see Neal, *The Status of Non-scheduled Operations under the Civil Aeronautics Act of 1938* (1946), 11 Law & Contemp. Prob. 508.

<sup>14</sup> *Investigation of Nonscheduled Air Service*, 6 CAB 1049 at 1051 (1946).

<sup>15</sup> *Ibid.*

<sup>16</sup> The proposed order would have exempted all air services transporting persons and property for hire subject to three limitations: (1) that the service must consist of trips originating or terminating at a principal place of business

The Board because of the additional developments since the investigation had been completed and because of lack of adequate information concerning non-scheduled operations, believed that the full factual basis customarily required before making a determination of regulatory policy had not been developed and a general revision was not then made in form.<sup>17</sup>

Although it delayed action on major revision of the exemption order at that time, the Board published its *Investigation of Nonscheduled Air Services*<sup>18</sup> and its decisions in *Page Airways, Inc., Investigation*<sup>19</sup> and *Trans-Marine Airlines Inc. Investigation*.<sup>20</sup> In these cases, the Board reaffirmed its belief that the distinction between scheduled and non-scheduled air carriers was a fundamental one and clarified its definition of non-scheduled. Non-scheduled operators were made subject to additional safety regulations<sup>21</sup> and informational reports were required from them in regard to rates charged, ownership, present and proposed services, types of aircraft used, the availability of service, and operational statistics.

The information obtained by the Board revealed that operations of non-scheduled operators were then of considerable importance, and that the operations of individual carriers were frequently extensive.<sup>22</sup> Some of the operations were conducted with little regard to the responsibility and duty owed to the public by a common carrier in respect to service. Specific tariff and operating practices including the failure to perform the service agreed upon, wide variations in rates for the same services, failure to make refunds for services not performed, misrepresentation of equipment and services, and use of inadequate equipment and facilities had been brought to the attention of the Board. Both the protection of the public and of certificated air carriers had made additional regulation necessary.

The information obtained also disclosed that there was then a demand and need for air services on an irregular basis. Such services were filling a need which, because of fluctuations in demand and the impossibility of determining where and when the demand would arise, could not be fulfilled economically by carriers operating on regular schedules and routes. These services could be performed by non-certificated air carriers more adequately, economically, and quickly than by certificated carriers because of their knowledge of local conditions or willingness to perform certain specialized types of services. Certification of such carriers at that time was found to be impracticable because a certificate which would impose no substantial limitation upon operations would have to be issued, or the certificate would substantially reduce the flexibility and usefulness of such carriers' operations. It was decided that certification in the case of many small carriers would be uneconomical and would prevent or retard the development of new types of services designed to meet special conditions.

---

of the operator, and that trips between other points be made only on a casual and infrequent basis; (2) that the number of trips operated between points where direct air service is available also be limited to a casual and infrequent basis, and as to such services, trips in excess of ten per month will be deemed to exceed such basis; (3) that the services must be those of a carrier engaged exclusively in operations falling within the first two limitations. *Id.* at p. 1051.

<sup>17</sup> For examples of the developments which had taken place since the investigation had been completed see *Business Week*, April 6, 1946, p. 34.

<sup>18</sup> 6 CAB 1049 (1946).

<sup>19</sup> 6 CAB 1061 (1946).

<sup>20</sup> 6 CAB 1071 (1946).

<sup>21</sup> 11 Fed.Reg. 5213 (May 14, 1946). Safety regulations for non-scheduled operators set standards for instruments and equipment, serviceability of aircraft, pilot qualifications and flight time limitations, weather minimums and fuel requirement minimums. Flight records and check-off lists in the pilot compartment were also required.

<sup>22</sup> Over 700 companies had filed reports by Nov. 1, 1946.

The Board believed that irregular services would not have any adverse competitive effect upon the services performed by the certificated air carriers because irregular services met a different need and must be infrequent or irregular.<sup>23</sup>

Application of the Board regulations in the past has been a source of some confusion. The economic regulations of the Civil Aeronautics Act are not applicable to those operators who are not common carriers engaged in interstate or foreign commerce.<sup>24</sup> In the *Page Airways, Inc., Investigation*,<sup>25</sup> the issue of whether the operations were such as would constitute common carrier operations was raised, the company insisting that its activities were those of a "private" or "contract" carrier and not those of a common carrier within the meaning of the Act.<sup>26</sup>

The Board applied the criteria applicable to determining whether surface carriers are common carriers and by analogy reached a test for air operations. The test the Board established was whether the carrier's service was generally available to anyone desiring it. Such availability could be broadcast to the world, acknowledged only upon inquiry, or established by a course of conduct.<sup>27</sup> Absence of a fixed schedule of charges and definite routes, and refusal to accept certain passengers did not necessarily result in negating common carrier status.

There is abundant judicial authority for the Board's definition.<sup>28</sup> Standards of surface carriers have long been applied to air operations.<sup>29</sup> As early as 1932, Illinois courts held what appeared to be a purely charter air service to be a common carrier.<sup>30</sup> As one author points out, the tendency to assume that the operation of trips only on the occasion of making a special contract results in a contract carrier status is actually unfounded.<sup>31</sup>

<sup>23</sup> 12 Fed.Reg. 3076 (May 10, 1947).

<sup>24</sup> By definition in the Civil Aeronautics Act: "Air carrier means any citizen of the United States who undertakes . . . to engage in air transportation." 52 Stat. 977 (1938), 49 USCA §401 (2) (Supp. 1946). Air transportation means "the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft." 52 Stat. 978 (1938), 49 USCA §401 (10) (21) (Supp. 1947).

<sup>25</sup> 6 CAB 1061.

<sup>26</sup> *Id.* at 1063. The basis of the Page contention was: (1) the company made individual contracts; (2) the company did not advertise; (3) converting a "private" carrier into a "common" carrier by legislative fiat would be repugnant to the due process clause of the Constitution; (4) the test should be whether an action would lie for failure to carry those who would comply with its terms. The first two arguments were not conclusive evidence of a common carrier status as the Board holds. The third argument was answered by the Supreme Court holding that there was no closed class or category of businesses affected with public interest. *Nebbia v. New York*, 291 U.S. 502 (1934). See also *Olsen v. Nebraska*, 313 U.S. 236 (1941). On the fourth argument, the Board distinguishes actions in tort and questions of regulatory powers and states that it has no power to determine the civil liability of the company. It points out that there was no evidence of any passenger having been refused carriage as long as space was available.

<sup>27</sup> *Page Airways, Inc., Investigation*, 6 CAB 1061 at 1065.

<sup>28</sup> *Propeller Niagara v. Cordes*, 62 U.S. 7 (1858); *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252 (1916); *Langer v. Ludkins*, 26 F.(2d) 855 (CAA 9th, 1918); *Fordham Bus Corporation v. United States*, 41 F. Supp. 712 (S.D.N.Y. 1941); *Cushing v. White*, 101 Wash. 172, 172 Pac. 229 (1918).

<sup>29</sup> *Curtiss Wright Flying Service v. Glose*, 66 F.(2d) 710 (C.C.A.N.J. 1933), cert. denied 290 U.S. 696 (1933), 1933 USAvR 26, 228; *Smith v. O'Donnell*, 215 Cal. 714, 12 P.(2d) 933 (1932), 1932 USAvR 145; *McCusker v. Curtiss Wright Flying Service*, 269 Ill. App. 502 (1932), 1932 USAvR 100; *Ziser v. Colonial Western Airways Inc.*, 10 N.J. Misc. 1118, 162 Atl. 591 (1932), 1933 USAvR 1.

<sup>30</sup> *McCusker v. Curtiss Wright Flying Service*, 269 Ill. App. 502 (1932), 1932 USAvR 100.

<sup>31</sup> Neal, *op. cit. supra* note 13 at p. 515.

Taxicabs have long been held to be common carriers.<sup>32</sup> Courts have held buses,<sup>33</sup> tugboats,<sup>34</sup> and trucking services<sup>35</sup> which operated only under special contract to be common carriers where the facilities were generally available. While there are cases which do hold some carriers furnishing a transport service to be contract carriers,<sup>36</sup> the service offered was so specialized in scope as to possibly negative a holding out to the general public.

There appears to be no reason for not applying standards applicable to surface carriers to air operations in order to determine whether a given activity is subject to Board regulation. The failure to regulate non-scheduled operations in the past has never been because of a determination that non-scheduled operators were not common carriers. However, there appears to be no classification comparable to non-scheduled operations in the field of surface carriers.<sup>37</sup>

After the operator has determined he is a common carrier, he must next determine if his operations are "irregular." The Board retains under the term "irregular" its definition of non-scheduled.<sup>38</sup> "It therefore becomes apparent that 'non-scheduled' has a far more restrictive meaning than the mere absence of a published timetable. Nor is it limited to a mere lack of preconceived plan, for it is obvious that through a general course of custom or practice a fairly consistent course of conduct may evolve, as well as through a predetermined arrangement, and it need only be uniform to the point of suggesting a moderately consistent service in order to be precluded from the scope of the exemption order. It is the thread of consistency which identifies an operation as one conducted with a reasonable degree of regularity. . . . The irregularity exempted can be reflected only by rare and infrequent flights if between the same two points, and must be of such rarity and infrequency as would preclude any implication of a uniform pattern or normal consistency of operation. . . . It is obvious that the test involves in large part the state of mind of both passenger and operator."<sup>39</sup>

In the *Page Investigation*, the Board stated the "vital" test to be the actual holding out to the public of a regular or reasonably regular service.<sup>40</sup>

<sup>32</sup> *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252 (1916); *Carlton v. Boudair*, 118 Va. 521, 88 S.E. 174 (1918); *Cushing v. White*, 101 Wash. 172, 172 Pac. 229 (1918).

<sup>33</sup> *Fordham Bus Corporation v. United States*, 41 F. Supp. 712 (S.D.N.Y. 1941).

<sup>34</sup> *State v. Washington Tug and Barge Co.*, 140 Wash. 613, 250 Pac. 49 (1926).

<sup>35</sup> *Gornish v. Public Utilities Commission*, 134 Pa. Super. 565, 4 A.(2d) 569 (1939).

<sup>36</sup> *Film Transport Co. v. Public Utilities Commission*, 17 F.(2d) 857 (E.D. Mich. 1927); *Columbus-Cincinnati Trucking Co. v. Public Utilities Commission*, 141 Ohio St. 228, 47 N.E.(2d) 623 (1943).

<sup>37</sup> 49 Stat. 552 (1935), 49 USCA §309 (Supp. 1946).

<sup>38</sup> CAB Economic Regulations §292.1 (b), 12 Fed.Reg. 3079 (May 10, 1947). Reference is made in the explanatory statement to the *Page* and *Trans-Marine* cases and to the *Investigation of Nonscheduled Air Services*. See notes 18, 19, 20 *supra*.

<sup>39</sup> *Investigation of Nonscheduled Air Services*, 6 CAB 1049, 1055. The Board postulates the case of a charter operator advertising its willingness and ability to carry passengers to any point within 500 miles. A group of sportsmen arrange for transportation to a week-end resort. Subsequently other groups make similar arrangements. "When the point is reached at which operator and passenger tacitly assume that trips will be operated between such points with fair regularity, and that the only question is whether space can be obtained on such flights, the operation ceases to be a non-scheduled operation within the meaning of the exemption order." *Ibid*.

<sup>40</sup> 6 CAB 1061, 1068 (1946).

It also stated that the holding out need not be through standard advertising media such as newspapers or periodicals. It was sufficient to show that it was known that an air service was being operated.<sup>41</sup> In the *Trans-Marine Investigation*, the Board again expanded its definition: "The service was planned to be operated with a reasonable degree of regularity and inquiries necessarily disclosed that such was the fact. Nothing more is needed to constitute a holding out of a regular or reasonably regular service."<sup>42</sup>

The language used goes farther than the facts of either case required. While the Page Airways had begun transport operations as the result of a private contract, it appeared that 295 of a total of 394 (74.9%) passengers carried were individual passengers and were not carried under the contract. Operations were carried on after the original contract had been cancelled. A traffic agent was employed and transportation porters in hotels at Miami, Fla., the Southern terminus of the operations, were advised that accommodations on flights would be available to the extent that space permitted. The agent was informed of plans to operate two flights each week on Monday and Thursday, and the names of passengers desiring return reservations on future flights were furnished.<sup>43</sup> The Trans-Marine Airline operated daily flights between New York City and Martha's Vineyard, Hyannis, and Nantucket, Monday through Friday. On August 4, 1945, the company had sold 1,670 reservations for flights projected to September 25, 1945.<sup>44</sup> In both instances it appeared that there was little question that there was an effort being made to establish a regular service.

The Board has utilized recent "cease and desist" orders to further clarify its interpretation of "irregular."<sup>45</sup> Much weight appears to be given to the form and effect of the carrier's advertising. If the carrier's advertising (or the carrier's representations) create a belief of regularity on the part of the public or travel and traffic agencies, the practices will be enjoined. This will be determined in part by seeing if the belief has been created that effective qualifications or limitations as to frequency and regularity of service exist and that air service between specific points is not "customarily, frequently, or regularly" available. It should be affirmatively disclosed that flights between any points are operated only on an occasional and infrequent basis and are of such rarity and infrequency as to prevent any implication of a uniform pattern or normal consistency of operation. There should be no suggestion that the operations between any specific points are greater than service between the principal place of business and any other points, or that the service between any points is greater than is reflected by actual operations between such points.

It appears to be, however, no limitation upon the number of flights which may be operated if irregularity and infrequency of service is achieved.<sup>46</sup> Under the language used by the Board, any air carrier which

<sup>41</sup> *Id.* at 1067.

<sup>42</sup> 6 CAB 1071, 1075 (1946).

<sup>43</sup> *Page Airways Inc., Investigation*, 6 CAB 1061.

<sup>44</sup> *Trans-Marine Airlines, Inc., Investigation*, 6 CAB 1071.

<sup>45</sup> Some of the typical orders are: *Matter of the Non-Certificated Operations of Trans-Caribbean Air Cargo Lines*, 7 CAB —, (Docket 2593, March 14, 1947) (mimeographed opinion); *Matter of the Non-Certificated Operations of Union Southern Airlines*, 7 CAB —, (Docket 2637, May 23, 1947) (mimeographed opinion); *Matter of the Non-Certificated Operations of Willis Air Service, Inc.*, 7 CAB —, (Docket 2639, April 22, 1947) (mimeographed opinion); *Matter of the Non-Certificated Operations of Alaska Air Service Inc.*, 7 CAB —, (Docket 3209, January 2, 1948) (mimeographed opinion). The latter order is unique in that an Alaskan carrier is also ordered to cease private carrier operations.

<sup>46</sup> The following paragraph is common to all the orders in note 45 *supra*. ". . . regularity is reflected by the operation of a single flight per week on the same day of each week between the same two points, or is reflected by the

Applicability of Sections of Title IV of the Civil Aeronautics Act

| SECTION  | IRREGULAR AIR CARRIERS  |   | NON-CERTIFIED CARGO CARRIERS |
|--|---|---|------------------------------|
|  | Small carriers operating a limited number of planes of small size | Carriers operating aircraft of large size |                              |
| 401 (1)—Labor legislation  | Yes   | Yes                                       | Yes                          |
| 403—Tariffs  | No  | Yes                                       | Yes                          |
| 404 (a)—Duty to provide service, etc.                              | In part   | In part                                   | In part                      |
| 404 (b)—Discrimination   | No  | Yes                                       | Yes                          |
| 407 (a)—Filing of reports  | If expressly required   | If expressly required                     | If expressly required        |
| 407 (b)—Disclosure of ownership of stock                           | No  | Yes                                       | Yes                          |
| 407 (c)—Disclosure of ownership of stock by officers and directors | No  | Yes                                       | Yes                          |
| 407 (d)—Form of accounts   | If expressly required   | If expressly required                     | If expressly required        |
| 407 (e)—Inspection of accounts and property                        | Yes   | Yes                                       | Yes                          |
| 408—Consolidation, merger, and acquisition of control              | No  | In part                                   | Yes                          |
| 409 (a)—Interlocking relationships                                 | No  | In part                                   | Yes                          |
| 409 (b)—Profit from the transfer of securities                     | Yes   | Yes                                       | Yes                          |
| 410—Loans and financial aid  | No  | Yes                                       | Yes                          |
| 411—Methods of competition   | Yes   | Yes                                       | Yes                          |
| 412—Pooling and other agreements                                   | No  | In part                                   | In part                      |
| 413—Form of control  | No<br>(Because of exemption from other sections)                  | Yes                                       | Yes                          |
| 414—Legal restraints   | Yes   | Yes                                       | Yes                          |
| 415—Inquiry into air carrier management                            | Yes   | Yes                                       | Yes                          |
| 416—Classification and exemption of carriers                       | Yes   | Yes                                       | Yes                          |



operates two or three (or more) flights between the same two points each week in succeeding weeks may be charged with operating a regular air service and the burden of proving irregularity would probably be placed upon the carrier. If, however, the service can be shown to have been carried on without a preconceived plan, and there have been frequent and extended definite breaks in service between the points, the service should clearly come within the situation in which the Board prescribes no maximum number of flights.

Further clarification of the regulations must await future Board decisions. This much can safely be said. To determine whether any operator is affected by the economic regulations, two questions must be answered. *First*, it must be determined whether the operations are those of a common carrier. If they are not, none of the economic regulations of the Board is applicable. *Second*, if the operations are of a common carrier status, are they sufficiently "irregular" to fall within the class granted exemptions by the Board? Any air carrier which operates frequent public flights between two or more points according to a predetermined plan is not within the class granted exemptions by the Board. It appears that in determining the existence of such a plan, the Board will look at the particular facts of each case. It will consider the past records of flights operated and whether reservations are taken for future flights. It will consider whether ticket or traffic agents are employed and notified of future flights, or whether flights are operated only at the instigation of a charterer. It will consider the form of advertising. There appears to be no fixed maximum number of flights per month if the service is irregular. If the facts appear to show that a regular service is being operated, a presumption of regularity arises which must be satisfactorily rebutted by the operator. If this is not done, the Board will order the operator to stop operating as a non-certified carrier.

ROBERT F. JACKSON\*

#### LIMITATIONS ON CHARTER SERVICES AS AUTHORIZED UNDER SECTION 401(f) OF THE CIVIL AERONAUTICS ACT OF 1938

On October 24, 1947, the Civil Aeronautics Board directed a letter to the airlines requesting that such carriers file tariffs with the Board providing rates and charges for charter services.<sup>1</sup> The letter pointed out that it is the opinion of the General Counsel's Office that any certificated air carrier which offers or performs common carrier charter and special services must file tariffs therefor with the Board, pursuant to Section 403 of the Civil Aeronautics Act of 1938 (Act), as amended, which requires that every air carrier file "tariffs showing all rates, fares and charges for air transportation between points served by it."<sup>2</sup> This letter is exemplary of the current interest with respect to charter and other special services performed by the air carriers under Section 401(f) of the Act.<sup>3</sup>

recurrence of operations of two round trip flights, or flights varying from two or three or more such flights, between any same two points each week in succeeding weeks, without there intervening other weeks or approximately similar periods at irregular but frequent intervals during which no such flights are operated so as thereby to result in appreciable definite breaks in service; it being intended by this subparagraph to require irregularity in service between any such points but not to preclude the operation of more than one or two such flights in any given week, nor to prescribe any specific maximum limitation upon the number of flights which may be performed in any one week, if infrequency and irregularity of service is otherwise achieved through variations in numbers of flights and through frequent and extended definite breaks in service."

\* Student, Northwestern Law School, Competitor Legal Publications Board.

<sup>1</sup> 53 Am. Av. Daily 126.

<sup>2</sup> 52 Stat. 973 (1938), 49 USCA §483 (Supp. 1947).

<sup>3</sup> *Id.* §481(f).

During the war years, with the restrictions on commercial aviation in that period, little attention seems to have been directed towards charter operations of the type authorized under Section 401(f). But now, with the airlines again in operation on a peacetime program, a tremendous increase in the volume of business transacted by such airlines is apparent. For example, during the year 1946, the certificated and non-certificated air carriers moved approximately 50 million ton-miles of air cargo, or over three times as much as was carried during the six-year period from 1935 through 1940.<sup>4</sup> A similar situation exists with respect to the other types of operations performed by the carriers. With this trend in mind, it is evident that an important question arises as to the rights granted to the air carriers by the charter provision of Section 401(f).

One of the problems which could arise under the provision may be illustrated by an hypothetical case. X Airlines holds a certificate of convenience and necessity authorizing it to operate a scheduled service between Chicago and New York as a common carrier. Y Airlines holds a certificate authorizing it to operate a similar service between Washington and Miami, Florida. Mr. A in Washington desires to charter a plane to Miami and approaches X Airlines on the matter. The question arises as to whether X Airlines, without violating its certificate, can furnish the desired charter service over a route which is served by Y Airlines. It seems apparent that to furnish the desired service would be a violation of X's certificate unless such service is authorized under Section 401(f). It therefore becomes necessary to inquire into the scope and limitations of such section.

The applicable sentence of Section 401(f) reads as follows:

"... Any air carrier may make charter trips or perform any other special service, without regard to the points named in its certificate, under regulations prescribed by the Board . . ."

At the present time, there are no regulations prescribed by the Board limiting operations under the above provision, and only three cases seem to have considered the problem. In *Western Air Express Corporation*<sup>5</sup> the holding was that the right to perform special services is incidental to the holding of a certificate of convenience and necessity to operate a scheduled service over a designated route, and that no other authorization is necessary where such a certificate is held. The Board, in *Pioneer Air Lines*<sup>6</sup> affirmed this ruling, stating that where said airline holds a certificate of convenience and necessity to operate over a fixed route, no additional authorization is necessary to permit the carrying of football teams to and from games as a charter service. The holding in *Ackerman Air Service, et al., Alaska Air Transportation Investigation*<sup>7</sup> was that charter and special services must be limited to occasional and infrequent trips. The Board in that case also said that appropriate regulations restricting the point of origin to the territory served by the carrier would be imposed. However, to date no such regulations have been propounded.

Because of the scarcity of cases interpreting Section 401(f), it will be necessary to look to the legislative history of the Act to discover what was intended to be included under the charter provision. The original bill leading to the Act was introduced by Senator McCarran in 1934, and was followed by numerous other bills until the Act attained its final form.<sup>8</sup> However,

<sup>4</sup> Drew and Passen, *Air Cargo: A New Force in Marketing*, 14 JOURNAL OF AIR LAW AND COMMERCE 11 (1947).

<sup>5</sup> 1 CAA 39 (1939).

<sup>6</sup> 7 CAB 469 (1946).

<sup>7</sup> 3 CAB 804 (1942).

<sup>8</sup> A complete list of these bills will be found in Rhyne, *Civil Aeronautics Act, Anno.* (1st ed. 1939) 190 *et seq.*

since the development of Section 401(f) in its present form may be attributed principally to three bills, the discussion will be limited to these.

The first bill is S 3027, proposed by Senator McCarran in 1935.<sup>9</sup> The section of that bill concerning the right to operate charter services as incidental to the holding of a certificate of convenience and necessity is Section 405(h), which provides as follows:<sup>10</sup>

"Any air carrier holding a certificate of public convenience and necessity issued under this part may transport in Interstate or Foreign Air Commerce to any place special and chartered parties, and may occasionally depart from the route over which it is authorized to operate under the certificate for the purpose of providing special service to a point not on such route, subject to police regulations of the several states, and in accordance with such regulations as the Commission may prescribe in the interest of public convenience and necessity."

The second bill is S 2, proposed by Senator McCarran in 1937.<sup>11</sup> This bill contains substantially the same language in Section 305(1) that is found in Section 405(h) of S 3027.<sup>12</sup>

The third bill is HR 9738, introduced in the House of Representatives by Mr. Lea in 1938.<sup>13</sup> In this bill there is a change of language in the applicable provision, Section 402(f) providing:<sup>14</sup>

"Any air carrier may make charter trips or perform any other special service, without regard to the points named in its certificate, under regulations prescribed by the Authority."

This language is that which became Section 401(f) of the Act insofar as that section deals with charter services.

It is worthwhile to note that the language of the applicable sections of bills S 3027 and S 2 is substantially the same as that contained in Section 208(c) of the Motor Carrier Act (MCA) of 1935.<sup>15</sup> The wording of the latter section is as follows:

"Any common carrier by motor vehicle transporting passengers under a certificate issued under this chapter may transport in Interstate or Foreign Commerce to any place special or chartered parties under such rules and regulations as the Commission may have prescribed."

It will be noted that the above language was adopted almost exactly in the charter provisions of bills S 3027 and S 2. Although the bills contain further provisions and limitations, a study of such provisions and limitations shows that they are found in the rules promulgated by the Interstate Commerce Commission (ICC) for the purpose of interpreting Section 208(c) of the MCA. It is very possible that the construction placed on Section 208(c) would also be applied to the comparable provisions of S 3027 and S 2, under the familiar canon of statutory construction that where the language of a preceding statute is adopted, the interpretation of the latter also follows.<sup>16</sup> Therefore, a discussion of the construction placed on Section 208(c) of the MCA will aid in determining the reasons for the difference in language between such bills and Section 401(f) of the Act as finally passed.

The leading case interpreting Section 208(c) is *Peninsula Transit Corpo-*

<sup>9</sup> 79 Cong. Rec. 8925 (1935).

<sup>10</sup> *Hearings before Committee on Interstate and Foreign Commerce on S 3027*, 74th Cong., 1st Sess. (1935).

<sup>11</sup> 81 Cong. Rec. 64 (1937).

<sup>12</sup> *Hearings before Committee on Interstate and Foreign Commerce on S 2*, 75th Cong., 1st Sess. (1937).

<sup>13</sup> 83 Cong. Rec. 2897 (1938). It may be noted that the Interdepartmental Bill from which HR 9738 was largely derived contained no provision at all concerning charter and special services.

<sup>14</sup> *Hearings before Committee on Interstate and Foreign Commerce on HR 9738*, 75th Cong., 3rd Sess. (1938).

<sup>15</sup> 49 Stat. 543 (1935), 49 USCA §308(c) (Supp. 1947).

<sup>16</sup> 2 Sutherland, *Statutes and Statutory Construction* (2nd ed. 1904) §404.

*ration Application*.<sup>17</sup> The Commission said in that case that the right to conduct charter operations is incidental to the holding of a certificate of public convenience and necessity authorizing regular-route operations.<sup>18</sup> No special authorization is needed except for those carriers who engage exclusively in charter operations. The Commission further ruled that it had no right to restrict the destination territory of such charter trips, but that it could restrict the origin territory to points along the regular route of the carrier,<sup>19</sup> basing its ruling on the language of the section.<sup>20</sup> Thus, a motor carrier holding a certificate of convenience and necessity authorizing regular-route operations was permitted to conduct charter services from a point on its route to any place in the United States without special authorization.

In *John C. Burns Application*,<sup>21</sup> the Commission affirmed its ruling as to the inability to restrict the destination territory of charter trips, stating that wherever such a restriction has been placed on the operation, the restriction is invalid.

Several of the cases subsequent to the *Peninsula* case further interpreted the meaning of origin territory. Charter parties must either originate in the territory served by the carrier in question, or such carrier must receive such party from another carrier at a point on its route.<sup>22</sup> In the contemplation of the Act, the territory served by the carrier does not include territory served in intrastate operations, over which the Commission has no general jurisdiction.<sup>23</sup> A charter service performed from a point not within the contemplated origin territory is a charter service exclusively and requires special authorization.<sup>24</sup> Further, where a carrier holds a certificate authorizing regular-route operations during a certain season, the right to conduct charter services under Section 208(c) is limited to the season of regular-route operation.<sup>25</sup>

In May, 1941, the Commission propounded a set of rules governing charter services under Section 208(c), which summarize the regulations for, and limitations of, such operations.<sup>26</sup> In brief, the rules define special or chartered parties as being groups traveling under a single contract to a specified destination for a common cause at a fixed rate for the vehicle,<sup>27</sup> and regular routes as those authorized between fixed termini by the certificate. The contemplated origin territory includes points on the regular route, authorized off-route points, and points within the territory served, while destination territory may be anywhere in the United States. The rules also require that tariffs be filed with the Commission for such services, that such services be

<sup>17</sup> 1 MCC 440 (1937).

<sup>18</sup> *Peoria-Rockford Bus Co. Appl.*, 2 MCC 185 (1937); *Interstate Busses Corp. Appl.*, 2 MCC 707 (1937); *Interstate Transit Lines Appl.*, 9 MCC 758 (1938).

<sup>19</sup> *Pittsburgh-Weirton Bus Co.*, 10 MCC 266 (1938); *McDuff-Turner Extension*, 7 MCC 766 (1938).

<sup>20</sup> The language in Section 208(c) relied on by the ICC is ". . . may transport . . . to any place . . ." Since there was no mention in the Act as to point of origin, the Commission decided that it could properly restrict that, but that the words "to any place" precluded any restriction on destination.

<sup>21</sup> 3 MCC 649 (1937); *Accord Penn Bus Co. Appl.*, 2 MCC 278 (1937).

<sup>22</sup> *New Mexico Transportation Co.*, 1 MCC 783 (1937).

<sup>23</sup> *Garden State Lines, Inc.*, 4 MCC 253 (1937).

<sup>24</sup> *St. Clair Bus Line Co., Inc.*, 23 MCC 73 (1940).

<sup>25</sup> *MacKenzie Coach Lines, Inc.*, 31 MCC 693 (1941).

<sup>26</sup> *Regulations Governing Special or Chartered Party Service*, 29 MCC 25 (May 29, 1941).

<sup>27</sup> The Commission stated that when the words "special or chartered parties" were used in Section 208(c), the former referred to the latter. The word "or" will not be read as "and" unless necessary to give meaning to the context. For that reason the word "or" is used in the sense of "to wit," thereby leaving chartered parties as the only type of operation authorized under Section 208(c). *Id.* at 36.

infrequent, and that where the certificate held is seasonal, charter operations be carried on only during such season. All cases that have arisen since the rules were compiled have been governed thereby.

These rules might well have been very influential in the construction of the charter provision of the Act if the language of bills S 3027 and S 2 had been adopted, because of the great similarity between the charter provisions of such bills and Section 208(c) of the MCA. Even under the wording of the Act as it stands, some of the same regulations might be applied. However, under the present wording, there are several points of difference between Section 401(f) of the Act, and Section 208(c) of the MCA.

In the first place, it will be noted that the language of Section 208(c) expressly limits the right to perform charter services to passenger carriers. There is no such limitation imposed under Section 401(f), and that section would seem to be equally applicable to carriers of passengers and of cargo.

The second point of difference arises with respect to the limitation of origin territory that the ICC adopted under Section 208(c). The language of Section 401(f) of the Act is that an air carrier may make charter trips "without regard to the points named in its certificate." Under that wording it appears that any restriction in regard to point of origin or destination would be invalid, where it referred to points named in the certificate. Thus it would seem that the Board could not properly limit the point of origin of charter trips to the territory served by the carrier, as was contemplated in the *Ackerman* case. But it should be noted that there is nothing in the language of Section 401(f) which would preclude a limitation of origin or destination by means of some point of reference other than a point named in the certificate of the carrier in question. Therefore, the Board could validly require that such carrier not perform charter operations between points served by another carrier, or which originate or terminate at a point authorized to be served by such other carrier, under its certificate. By that means, both origin and destination may be limited under Section 401(f), whereas under Section 208(c) of the MCA, only origin territory might be limited.

The final point of difference concerns the meaning of the words "charter trips" and "special service." Under the MCA, the Commission interpreted special or charter service to mean one and the same thing, saying that the former referred to the latter, for the purpose of Section 208(c).<sup>28</sup> Under Section 401(f) of the Act, such an interpretation is not possible. The two types of operations are clearly differentiated by the language of such section, which refers to "charter trips and any other special services." What is meant by that language is largely a matter of conjecture at the present time. It is interesting to note that the ICC did differentiate the two types of services with respect to those carriers who were certificated to engage exclusively in charter and special services under Section 207(a) of the MCA. For the purpose of those operations, the Commission ruled that a charter service contemplates the transportation as such of groups assembled by one other than the carrier which collectively contract for the exclusive use of the equipment for the duration of a particular trip or tour. On the other hand, a special service contemplates groups assembled by the carrier, generally on week-ends, holidays, or other special occasions, to which individual tickets are sold.<sup>29</sup> The Commission adopted the former definition for special or charter services under Section 208(c) of the MCA.<sup>30</sup> Although it is not clear what interpretation will be placed on charter and other special services under Section 401(f) of the Act, it seems that such interpretation must of

<sup>28</sup> See note 27 *supra*.

<sup>29</sup> *Fordham Bus Co. Appl.*, 29 MCC 293 (1941); *Liederbach Extension*, 41 MCC 595 (1941).

<sup>30</sup> *Regulations, etc.*, 29 MCC 25, 38, 47.

necessity be somewhat broader than that placed on Section 208(c), because of the differentiation under Section 401(f) of the two types of services.

The Board has raised the further problem of the applicability of Section 403 of the Act, requiring the filing of tariffs, to all charter and special services authorized under Section 401(f). The carriers argue that the requirements of Section 403 apply only to common carrier services.<sup>31</sup> Since Section 401(f), in the opinion of the carriers, authorizes certain services which are not of that type, they argue that they are not required to file tariffs for such services as are not common carrier services.

Considering the hypothetical case posed in the light of the above discussion, it appears that X Airlines, by virtue of holding a certificate authorizing it to operate a scheduled service, automatically has the right to perform charter services under Section 401(f). The desired service would be a charter service under the definition of the MCA, and therefore, would very probably fall within the meaning of charter trips or special services under Section 401(f) of the Act. Since there are no regulations at the present time limiting points of origin or destination, the fact that Y Airlines operates a scheduled service between Washington and Miami would not seem to preclude X Airlines from furnishing the desired service. X Airlines, therefore, may properly charter a plane to Mr. A to furnish such service without violating its certificate.

It appears that at present the rights granted to the airlines under Section 401(f) are very broad. The exact scope of such section cannot be determined until special and charter services are actually defined by the Board, but the words seem to cover a variety of operations. However, the Board may in the future somewhat curtail operations under Section 401(f) by the exercise of its power to impose appropriate regulations, such a restriction on origin and destination territory of the type suggested above, or by requiring that such operations be occasional and infrequent, as was done in the *Ackerman* case, or by other regulations consistent with the Act.

T. B. STIBOLT \*

---

<sup>31</sup> §403 requires that "air carriers" file tariffs for air transportation. §1(2) defines "air carrier" as any citizen of the United States who undertakes to engage in "air transportation." §1(10) states that "air transportation" means "interstate, overseas, or foreign air transportation." In §1(21), "interstate, overseas, or foreign air transportation" are defined as meaning the carriage by aircraft of persons or property "as a common carrier." Therefore, §403 applies only to common carrier operations.

\* Student, Northwestern Law School, Competitor Legal Publications Board.